

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF APPLICATION FOR)	
BENEFICIAL WATER USE PERMIT NO.)	FINAL ORDER
21223-s76H BY MR. AND MRS.)	
R. ALLEN BOYD)	

* * * * *

The Proposal for Decision in the Matter of Application for Beneficial Water Use Permit No. 21223-s76H by Mr. and Mrs. R. Allen Boyd was entered by the Hearing Examiner on August 12, 1980. Exceptions to the Proposal for Decision were entered on behalf of objectors David J. and Frances H. Maclay by Helena S. Maclay; and on behalf of Larry R. Kolb and Larry R. Kolb, Inc., by William T. Wagner.

The following is the Hearing Examiner's response to those exceptions and the revised Findings of Fact, Conclusions of Law and Final Order.

RESPONSE TO EXCEPTIONS

A. By Helena S. Maclay on behalf of David J. and Frances H. Maclay:

1. Exception: That the Applicants failed to produce evidence that there are no unappropriated waters available in Mormon Creek.

Response: The findings that there are unappropriated waters available in Mormon Creek from April 15 to June

15 was based on the testimony of Objector, David J. Maclay. Mr. Maclay stated that over the last 4 to 5 years there has been a flow of approximately 1100 to 1200 inches (miner's inches) of water in Mormon Creek during the spring runoff. Mr. Maclay further testified that the spring runoff generally lasts until mid-June and is finished by the first of July. The further testimony of Mr. Marbut on behalf of Mr. Kolb was that there are 830 inches of decreed water on Mormon Creek. Therefore, it was found that there are unappropriated waters available during the spring runoff, generally ending by June 15.

2. Exception: That the Objector's testimony established that there are no unappropriated waters available, even during spring runoff.

Response: See above response.

3. Exception: That the granting of this water right to the Applicants is so junior that it is of little value and that it places an increased administrative burden on existing appropriators.

Response: The Applicant testified that he could beneficially use the water, even if it were available for only a portion of the period for which he applied for water. There was no testimony presented to the contrary. An Application for Beneficial Water Use

cannot be denied because existing users may be forced to hire a water commissioner or exert more effort in protecting their rights. The potential problem of enforcement of this particular permit is addressed in condition number 3 of the Proposed and Final Orders.

4. Exception: That Proposed Finding of Fact Number 5 is incorrect and incomplete.

Response: The second right on Mormon Creek was omitted since the individual(s) claiming that right did not testify at the hearing. Proposed Finding of Fact number 5 has been amended in the Findings of Fact set forth in the Final Order.

5. Exception: That the criteria set forth in Section 85-2-311, MCA, were not met.

Response: See Conclusions of Law numbers 4-6 and 8-11. (Conclusion number 6 has been revised from the Proposed Conclusions of Law).

B. By William T. Wagner on behalf of Larry R. Kolb and Larry R. Kolb, Inc.

1. Exception: That Proposed Finding of Fact number 7 is incomplete.

Response: Neither the objection filed on behalf of Mr. Kolb nor the testimony presented on Mr. Kolb's behalf at

the hearing stated that Mr. Kolb diverted his decreed water via the Lolo-Maclay Ditch. There was testimony presented by Mr. Maclay that Mr. Kolb could deliver his decreed water via the Lolo-Maclay Ditch, therefore, the requested changes are made in the Findings of Fact in the Final Order.

2. Exception: That Proposed Finding of Fact number 8 is incomplete.

Response: Based on the above noted change, the Finding of Fact number 8 in the Final Order has been amended on this point.

Due to the concern over potential enforcement of this permit, a further condition to the permit has been added to the Final Order (see condition number 5 in the Final Order). Condition number 5 of the Proposed Order is now condition number 6 in the Final Order.

FINDINGS OF FACT

Based on the transcript of the hearing and the information contained in the Department's file in this matter it is found:

1. That there are no unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicants, except during the spring runoff which generally ends by June 15.

2. That the Applicants can beneficially use water available during spring runoff.
3. That unappropriated water is available for irrigation for approximately 30 percent (62 of 201 days) of the period requested in the Application, therefore, the Applicants could reasonably appropriate only 30 percent of 1.5 acre-feet of the 5 acre-feet per annum requested.
4. That the loss of water due to seepage from a ditch does not mean that that water has been abandoned.
5. That the Objectors, the Maclays and Mr. Kolb, possess valid prior rights on Mormon Creek. The Objectors share equally the 1st right for 150 miner's inches and the 3rd right for 650 miner's inches for a total of 800 miner's inches.
6. That the Applicants' domestic water supply is adequate to water their livestock.
7. That the Applicants' proposed point of diversion is downstream from all of the points of diversion used by the Objectors except for the Lolo-Maclay Ditch used by the Maclays and Mr. Kolb.
8. That the granting of this Permit as requested could adversely affect the prior rights of the Maclays and Mr. Kolb.

CONCLUSIONS OF LAW

1. Section 85-2-311, MCA, 1979, states that "The Department shall issue a permit if:

1. there are unappropriated waters in the source of supply:

a. at times when the water can be put to the use proposed by the applicant:

b. in the amount the applicant seeks to appropriate; and

c. throughout the period during which the applicant seeks to appropriate, the amount requested is available.

2. the rights of a prior appropriator will not be adversely affected;

3. the proposed means of diversion or construction are adequate;

4. the proposed use of water is a beneficial use;

5. the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;"

2. Section 85-2-312 (1), MCA, 1979, states in part that, "The Department may issue a permit for less than the amount of water requested . . . It may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators . . ."

3. Section 85-5-101, MCA, 1979, states in part, "The Commissioner shall have authority to admeasure and distribute to the parties owning water rights in the source affected by the decree, the waters to which they are entitled, according to their rights as affixed by the decree and by any certificates and permits issued under Chapter 2 of this title."

4. It is concluded that there are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant.

5. It is concluded that there are unappropriated waters in the source of supply in the amount the Applicant seeks to appropriate.

6. It is concluded that there are unappropriated waters in the source of supply throughout the period April 15 to June 15 in the amount requested.

7. It is concluded that the Permittee shall be under the jurisdiction of the Water Commissioner, if any, in this area.

8. It is concluded that the rights of prior appropriators will not be adversely affected by the granting of this permit, subject to certain conditions in the Proposed Order.

9. It is concluded that the proposed use is a beneficial use.

10. It is concluded that the proposed means of diversion or construction are adequate.

11. It is concluded that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

12. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing on the status of claimed rights of any other party except in relation to those herein applied for, to the extent necessary to reach a conclusion herein.

Based on the Findings of Fact and Conclusions of Law, the following Final Order is hereby made:

FINAL ORDER

1. Subject to the conditions and limitations listed below, Provisional Permit No. 21223-s76H by Mr. and Mrs. R. Allen Boyd, is hereby granted to appropriate 15 gallons per

minute, not to exceed 1.5 acre-feet per annum from Mormon Creek in Missoula County, Montana. The water is to be diverted from a point in the SW1/4 NE1/4 SE1/4 of Section 33, Township 12 North, Range 20 West, M.P.M., Missoula County, Montana. The water is to be diverted from April 15 to June 15 (underlined for emphasis) inclusive, of each year, and used for new sprinkler irrigation on 2 acres, more or less, in the SE1/4 of Section 33, Township 12 North, Range 20 West, M.P.M. The water is to be diverted by means of a one-horsepower electric pump.

2. Provisional Permit No. 21223-s76H is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana Law.

3. This Provisional Permit is subject to the authority of court appointed Water Commissioners, if and when appointed, to measure and distribute to parties using waters in the source of supply, the waters to which they are entitled, including the waters granted in this Provisional Permit. The Permittee shall pay his proportionate share of the fees and compensation expenses, as affixed by the District Court, incurred in the distribution of the waters granted in this Provisional Permit.

4. The Permittee shall install a suitable headgate or diversion structure at the point the water is diverted from the source of supply. The Permittee shall install an

adequate flow measuring device at a suitable place as near as practicable to the point where the water is diverted from the source of supply, in order to record the flow rate and volume of all waters diverted, including the period of time and shall submit said records to the Department upon request.

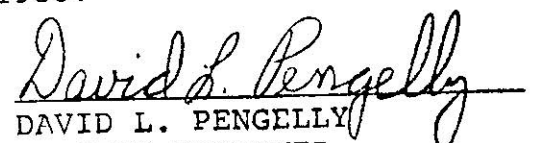
5. The Permittee shall only appropriate water at such times during the April 15 to June 15 period when water is flowing past the Lolo-Maclay Ditch diversion from Mormon Creek.

6. The issuance of this Provisional Permit by the Department in no way reduces the Permittees' liability for damages caused by the Permittees' exercise of this Provisional Permit nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by Permittees' exercise of the Provisional Permit.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 18th day of September, 1980.


DAVID L. PENGELLY
HEARING EXAMINER

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) PROPOSED ORDER
21223-s76H BY MR. AND MRS. R.)
ALLEN BOYD)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on April 23, 1980, at Missoula, Montana, for the purpose of hearing objections to Application for Beneficial Water Use Permit No. 21223-s76H, David Pengelly, Hearing Examiner, presiding.

The Applicant, Mr. R. Allen Boyd, appeared at the hearing and presented testimony in support of the Application. Mr. Boyd was represented by legal counsel, James Sadler, Missoula, Montana. The Applicant introduced one exhibit, to wit:

Applicant's Exhibit:

A-1 Series of four photographs showing purported waste of water by Larry R. Kolb, Objector.

The Applicant's exhibit was entered into the record with no objections.

Two Objectors, Mr. David J. Maclay and Mr. Larry R. Kolb, were present at the hearing. Mr. Maclay was represented by Ms. Helena Maclay, and Mr. Robert Knight, both of Missoula, Montana. Mr. Kolb was represented by Mr. William T. Wagner, Missoula, Montana. Mr. A. Reed Marbut, a private consultant, appeared at the hearing and presented testimony on behalf of Mr. Larry R. Kolb. No exhibits were introduced by the Objectors.

Montana Department of Natural Resources and Conservation personnel

present at the hearing were Arlin Krogstad, Hearing Representative; Larry Brown, Hydrologist; Jan Mack, Missoula Water Rights Bureau Field Office Manager; and Vicki Woodrow, Hearing Reporter. The Department introduced two (2) exhibits, to wit:

Department's Exhibits:

D-1 Photocopy of Mormon Creek Estates, No. 2 Plat from Book 10, #2 - Drawer #2, Missoula County Clerk and Recorder's Office.

D-2 Copy of plat map showing the Applicant's property.

The Department's exhibits were entered into the record without objections. The Department was not represented by legal counsel.

SUMMARY OF RECORD

1. On December 5, 1978, the Department received an Application for Beneficial Water Use Permit No. 21223-s76H by Mr. and Mrs. R. Allen Boyd to appropriate 16 gallons per minute up to 5.1 acre-feet per annum from Mormon Creek. The water is to be diverted from the SW1/4 NE1/4 SE1/4 of Section 33, Township 12 North, Range 20 West, M.P.M., Missoula County, Montana. The water is to be used in the SE1/4 of Section 33, Township 12 North, Range 20 West, M.P.M., for new sprinkler irrigation on 2 acres, more or less, and the SW1/4 NE1/4 SE1/4 of Section 33, Township 12 North, Range 20 West, M.P.M., for stock watering. The water is to be diverted from April 15 to October 31, inclusive, of each year, at a rate of 15 gallons per minute up to 5 acre-feet per annum for new sprinkler irrigation and from January 1 to December 31, inclusive, of each year, at a rate of 1 gallon per minute up to 0.1 acre-foot per annum for stock water. The water is to be diverted by means of a one horsepower electric pump.

2. On April 11, 18, and 25, 1979, the Department caused to be duly

published in the Missoulian, Missoula, Montana, notice of Application for Beneficial Water Use Permit No. 21223-s76H.

3. On April 11, 1979, the Department received an objection to the above Application from the Montana Power Company.

4. On May 15, 1979, the Department received an objection to the above Application from Larry R. Kolb and Larry R. Kolb, Inc. Mr. Kolb's objection was prepared by A. Reed Marbut.

5. On May 30, 1979, the Department received an objection to the above Application from David J. Maclay and Francis H. Maclay.

PROPOSED FINDINGS OF FACT

Based on the transcript of the hearing and the information contained in the Department's file in this matter, it is found:

1. That there are no unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant except during the spring runoff which generally ends by June 15.

2. That the Applicant can beneficially use water available during spring runoff.

3. That unappropriated water is available for irrigation for approximately 30 percent (62 of 201 days) of the period requested in the Application, therefore, the Applicant could reasonably appropriate only 30 percent or 1.5 acre-feet of the 5 acre-feet per annum requested.

4. That the loss of water due to seepage from a ditch does not mean that that water has been abandoned.

5. That the Objectors, Mr. Maclay and Mr. Kolb, possess valid prior rights in the amount of 800 miner's inches.

6. That the Applicant's domestic water supply is adequate to water his livestock.

1 7. That the Applicant's proposed point of diversion is downstream
2 from all of the points of diversion used by the Objectors except for one
3 (1) used by Mr. Maclay.

4 8. That the granting of this Permit as requested could adversely
5 affect the prior rights of Mr. Maclay.

6
7 PROPOSED CONCLUSIONS OF LAW

8 1. Section 85-2-311, MCA, 1979, states that, "The Department shall
9 issue a permit if:

- 10 1. there are unappropriated waters in the source of supply:
11 a. at times when the water can be put to the use
12 proposed by the applicant;
13 b. in the amount the applicant seeks to appropriate; and
14 c. throughout the period during which the applicant
15 seeks to appropriate, the amount requested is available;
16 2. the rights of a prior appropriator will not be adversely
17 affected;
18 3. the proposed means of diversion or construction are
19 adequate;
20 4. the proposed use of water is a beneficial use;
21 5. the proposed use will not interfere unreasonably with
22 other planned uses or developments for which a permit has
23 been issued or for which water has been reserved."

24 2. Section 85-2-312 (1), MCA, 1979, states in part that, "The
25 Department may issue a permit for less than the amount of water requested . . .
26 It may issue a permit subject to terms, conditions, restrictions, and
27 limitations it considers necessary to protect the rights of other
28 appropriators . . ."

1 3. Section 85-5-101, MCA, 1979, states in part, "The Commissioner
2 shall have authority to admeasure and distribute to the parties owning
3 water rights in the source affected by the decree, the waters to which
4 they are entitled, according to their rights as affixed by the decree
5 and by any certificates and permits issued under Chapter 2 of this
6 title."

7 4. It is concluded that there are unappropriated waters in the
8 source of supply at times when the water can be put to the use proposed
9 by the Applicant.

10 5. It is concluded that there are unappropriated waters in the
11 source of supply in the amount the Applicant seeks to appropriate.

12 6. It is concluded that there are no unappropriated waters in the
13 source of supply throughout the period during which the Applicant seeks
14 to appropriate in the amount requested.

15 7. It is concluded that the Permittee shall be under the jurisdiction
16 of the Water Commissioner, if any, in this area.

17 8. It is concluded that the rights of prior appropriators will not
18 be adversely affected by the granting of this permit, subject to certain
19 conditions in the proposed order.

20 9. It is concluded that the proposed use is a beneficial use.

21 10. It is concluded that the proposed means of diversion or construction
22 are adequate.

23 11. It is concluded that the proposed use will not interfere
24 unreasonably with other planned uses or developments for which a permit
25 has been issued or for which water has been reserved.

26 12. Nothing decided herein has bearing on the status of water
27 rights claims by the Applicant other than those herein applied for, nor
28 does anything decided herein have bearing on the status of claimed

rights of any other party except in relation to those herein applied for, to the extent necessary to reach a conclusion herein.

Based on the Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions and limitations listed below, Provisional Permit No. 21223-s76H by Mr. and Mrs. R. Allen Boyd, is hereby granted to appropriate 15 gallons per minute, not to exceed 1.5 acre-feet per annum from Mormon Creek in Missoula County, Montana. The water is to be diverted from a point in the SW1/4 NE1/4 SE1/4 of Section 33, Township 12 North, Range 20 West, M.P.M., Missoula County, Montana. Water is to be diverted from April 15 to June 15, inclusive, of each year, and used for new sprinkler irrigation on 2 acres, more or less, in the SE1/4 of Section 33, Township 12 North, Range 20 West, M.P.M. The water is to be diverted by means of a one-horsepower electric pump.

2. Provisional Permit No. 21223-s76H is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana law.

3. This Provisional Permit is subject to the authority of court appointed Water Commissioners, if and when appointed, to measure and distribute to parties using waters in the source of supply, the waters to which they are entitled, including the waters granted in this Provisional Permit. The Permittee shall pay his proportionate share of the fees and compensation expenses, as affixed by the District Court, incurred in the distribution of the waters granted in this Provisional Permit.

4. The Permittee shall install a suitable headgate or diversion structure at the point the water is diverted from the source of supply.

1 The Permittee shall install an adequate flow measuring device at a
2 suitable place as near as practicable to the point where the water is
3 diverted from the source of supply, in order to record the flow rate and
4 volume of water diverted. The Permittee shall keep a written record of
5 the flow rate and volume of all waters diverted, including the period of
6 time and shall submit said records to the Department upon request.

7 5. The issuance of this Provisional Permit by the Department in no
8 way reduces the Permittees liability for damages caused by the Permittee's
9 exercise of this Provisional Permit, nor does the Department in issuing
10 the Provisional Permit in any way acknowledge liability for damage
11 caused by the Permittee's exercise of the Provisional Permit.

12
13 NOTICE

14 This Proposed Order is offered for the review and comment of all
15 parties of record. The review and comment period shall commence with the
16 service of this Proposed Order and shall end ten (10) days thereafter.
17 No extensions of time for comment will be granted.

18 The Final Order in this matter will be sent to all parties by
19 certified mail.

20 The Department's Final Order may be appealed in accordance with the
21 Montana Administrative Procedures Act by filing a petition in the appropriate
22 court within thirty (30) days after service of the Final Order.

23 DATED this 12th day of August, 1980.

24
25 *David L. Pengelly*
26 DAVID L. PENGELLY, D. N. R. & C.
27 HEARING EXAMINER
28